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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-148

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SOLOMON BLOCK,

Petitioner,

vs.

SYLVIA CONSINO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Respondents to these proceedings, creditor claimants against Petitioner in his bankruptcy proceeding now pending in the United States District Court for the Central District of California, respectfully oppose the petition for a writ of certiorari in the within matter.

Opinions Below.

The Order of the District Court (App. B of Petition) is not reported. The Opinion of the Court of Appeals for the Ninth Circuit (App. C of Petition) is reported at 535 F.2d 1165.

Jurisdiction.

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1254(1). The Respondents in this case respectfully submit that, for the reasons

set forth herein, this Court lacks jurisdiction over the present case because it is moot.

Questions Presented.

1. Whether Petitioner could properly be adjudged in civil contempt for his refusal to answer certain questions propounded by creditors during a creditor's meeting incident to his bankruptcy proceedings on the ground that answers to such questions might tend to incriminate him, despite the fact that under Section 7 (a)(10) of the Bankruptcy Act, 11 U.S.C. §25(a) (10), none of his testimony, nor any evidence which is directly or indirectly derived from such testimony, may be offered against him in any criminal proceeding?

2. Whether Petitioner could properly be adjudged in civil contempt for his refusal to answer certain questions propounded by creditors during a creditor's meeting incident to his bankruptcy proceedings on the ground of irrelevancy after the bankruptcy judge ruled such questions relevant and otherwise proper?

3. Whether, under the procedures established in Bankruptcy Rule 920, the bankruptcy judge was required to hold a hearing with respect to Petitioner's contempt prior to certifying the facts concerning such contempt to the district judge, which hearing would duplicate the hearing to be had before the district judge?

Statement.

Petitioner was an accountant employed by the auditors of Equity Funding Corporation of America ("EFCA") during the period of time that a fraudulent scheme of massive proportions was being perpetrated on the national securities market, unsuspecting investors

in EFCA, the Securities and Exchange Commission, and other governmental agencies and persons. In an indictment returned in 1973 by the Grand Jury for the Central District of California, Petitioner, together with 21 other persons, was accused of knowingly and willfully participating in and furthering that fraudulent scheme.

While Petitioner would have this Court believe that he was one of the "primary victims of the fraud at EFCA" (Pet., p. 3), and that the indictment was "erroneously returned against him" (Pet., p. 4), he has failed to disclose to this Court that in May, 1975, he was convicted by the jury for his crimes committed in connection with the fraudulent scheme, and that sentence has been pronounced upon him by the District Court. That conviction is now on appeal to the United States Court of Appeals for the Ninth Circuit.

This petition stems from Petitioner's voluntary bankruptcy proceedings. In those proceedings, at the first meeting of creditors and the continued first meeting of creditors, the Respondents, scheduled creditors of Petitioner, and plaintiffs in the multidistrict litigation known as *Equity Funding Corporation of America Securities Litigation*, M.D.L. Docket No. 142-MML, appeared and propounded certain questions to Petitioner.

Petitioner refused to answer those questions on the ground that answers to such questions might tend to incriminate him and that they were irrelevant. The bankruptcy judge overruled his objections and ordered him to answer, but Petitioner persisted in his refusal to answer. Thereafter, the bankruptcy judge certified the facts to the district judge.

On May 17, 1974 the district judge ordered that Petitioner be adjudged in civil contempt for his refusal. (App. B of Petition.) The district judge further ordered that Petitioner be incarcerated until he purged himself of his contempt or until the bankruptcy proceedings were completed, and stayed the order of incarceration for ten days. (App. B of Petition.)

On June 25, 1974, Petitioner appeared before the bankruptcy judge and he answered the specific questions that he had previously refused to answer. Thereafter, Petitioner contended that he had purged himself of his contempt. This contention was disputed by the Respondents.

Petitioner appealed from the order adjudging him in civil contempt. Pending appeal Petitioner was not incarcerated.

On May 3, 1976 the United States Court of Appeals for the Ninth Circuit affirmed the District Court's order, *Block v. Consino*, 535 F.2d 1165. After the district court's order was affirmed, Respondents made a motion to enforce the order. The District Court ruled that Petitioner had in fact purged himself of contempt, and denied the motion to enforce the order.

Contrary to the implied suggestion in the Petition (Pet., p. 5), Petitioner has never been incarcerated under the order adjudging him in civil contempt.

ARGUMENT.

The Petition fails utterly to state any reason why this Court should grant certiorari and thereby has failed to comply with Rule 19 of this Court. Instead of articulating any such reason, the Petition merely sets forth Petitioner's argument on the merits that, in his view, the opinion of the Court of Appeals for the Ninth Circuit was in error. That does not suffice. Moreover, in the present procedural posture of this case it is plain that no sufficient reasons could be given why this Court should grant certiorari.

1. Certiorari Should Be Denied Because the Controversy Is Now Moot.

As set forth in the Statement, *supra*, the District Court ruled Petitioner has purged himself of his contempt. In view of that fact the controversy which resulted in District Court's order adjudging Petitioner to be in civil contempt of that Court for his refusal to answer certain questions is now moot. *United States v. Watson Chapel School District No. 24*, 446 F.2d 923, 938-939 (8th Cir. 1971); *Federal Trade Commission v. Stroiman*, 428 F.2d 808, 808-809 (8th Cir. 1970); *Kelley v. United States*, 199 F.2d 265, 266-267 (4th Cir. 1952); *Cf. Fowler v. Huber*, 437 F.2d 1117 (5th Cir. 1971).

For this reason alone, the petition for a writ of certiorari should be denied.

2. Petitioner Has Failed to State Any Reason Why This Court Should Grant Its Writ of Certiorari.

Petitioner has shown no conflict among the circuits, no conflict with the decisions of this Court, no important question of federal law that has not previously been

decided by this Court, and certainly no shocking or egregious departure from the normal course of judicial proceedings.

To the contrary, Petitioner brings to this Court arguments so slight in substance as to border on the invisible. Petitioner has failed to recognize that this Court does not sit to correct every claimed error occurring in the inferior courts of the United States, but to grant review by writ of certiorari only when special and important reasons for the exercise of this Court's discretionary jurisdiction are shown to be present. Petitioner has not undertaken to show that this case presents such reasons, and has thereby failed to comply with this Court's Rule 19.

3. The Petition Is Without Merit.

The opinion of the United States Court of Appeals for the Ninth Circuit announced below, *Block v. Consino, supra*, 535 F.2d 1165, completely disposes of each of the questions presented by Petitioner.

Briefly stated, Petitioner has no privilege under the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution to refuse to answer the questions put to him by his creditors during a creditor's meeting incident to his bankruptcy proceedings because Petitioner is granted immunity against the use of his testimony and evidence derived directly or indirectly therefrom in any criminal proceeding by Section 7(a)(10) of the Bankruptcy Act, 11 U.S.C.

§25(a)(10). This immunity is co-extensive with the Fifth Amendment privilege. *Kastigar v. United States*, 406 U.S. 441 (1972).

There is no significant difference between Section 7(a)(10) of the Bankruptcy Act and the provisions of the Organized Crime Control Act of 1970 upheld in *Kastigar*. Moreover, even if such differences did exist, which is not conceded, the opinion of the Court of Appeals which construes the statute in a manner which avoids the constitutional question should not be disturbed so long as such construction is fairly possible. *Ashwander v. TVA*, 297 U.S. 288, 346-348 (Brandeis, J., concurring).

It is sheer sophistry to contend that Title II of the Organized Crime Control Act of 1970, 18 U.S.C. §§6001-6005, which was enacted simultaneously with the 1970 Amendments to Section 7(a)(10) of the Bankruptcy Act, was designed to repeal those very amendments. (Pet., pp. 5-9.)

The questions asked of Petitioner directly concerned, among other relevant subjects of examination, Petitioner's liability to Respondents for his complicity in the massive EFCA fraudulent scheme, and were thus relevant to show that his debts to Respondents were not dischargeable. However, even if such questions were not relevant, which is not conceded, it is an imposition to ask this Court to revise decisions of bankruptcy judges on mundane matters of the law of evidence.

Finally, it plainly appears that the procedure followed by the bankruptcy judge exactly comported with the requirements of Bankruptcy Rule 920.

Conclusion.

For the foregoing reasons and authority, this Court should deny the petition for certiorari.

Dated: August 31, 1976.

Respectfully submitted,

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